IN THE SUPREME COURT

STATE OF ARIZONA

KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Senate Judiciary Committee; and the ARIZONA SENATE, a house of the Arizona Legislature,

Petitioners,

v.

THE HONORABLE MICHAEL KEMP, in his official capacity as a judge of the Superior Court for Maricopa County,

Respondent; and

AMERICAN OVERSIGHT,

Real Party in Interest.

No. _____

Court of Appeals No.
1 CA-SA 21-0141

Maricopa County Superior Court No.
CV2021-008265

PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS

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Pursuant to Rule 8(b), Rules of Procedure for Special Action, and Rule 23, Rules of Civil Appellate Procedure, Senate President Karen Fann, Senate Judiciary Committee Chairman Warren Petersen, and the Arizona Senate (collectively, the "Senate") respectfully submit this Petition for Review of a Special Action Decision of the Court of Appeals.

INTRODUCTION

The right of a constitutional department of government to control its own records is the hallmark of institutional independence and the fulcrum of the separation of powers. For that reason, this Court affirmed just weeks ago that the act of releasing—and, by extension, of withholding—purported legislative records is itself a "legislative function" that is clothed with absolute immunity from any resulting civil liability. *See Mesnard v. Campagnolo*, -- Ariz. --, 489 P.3d 1189, 1195-96, ¶¶ 22-23 (2021). In derogation of this principle, and in an extraordinary incursion into the sovereign affairs of a coordinate branch, the Court of Appeals has announced that the judiciary henceforth will police the Legislature's recordkeeping and production judgments.

This constitutional error is compounded by one of statutory construction. The Superior Court (with the Court of Appeals' acquiescence) has purported to order the President of the Senate to obtain and produce as "public records" the internal files of non-party private corporations—notwithstanding that such materials are, by definition, not in

the "custody" of the Senate, and thus not subject to production under the Arizona Public Records Act, A.R.S. § 39-121, *et seq.* (the "PRA").

This Court's intervention is necessary to vindicate the intrinsic immunities of the legislative branch, recognize the PRA's textual inapplicability to the internal records of private government vendors, and preserve the constitutionally ordained equilibrium between the legislative and judicial branches.

STATEMENT OF THE CASE

I. Factual Background

Exercising the investigatory powers vested in the elected Legislature, the Arizona Senate is conducting an audit of voting equipment used and ballots cast in Maricopa County in connection with the November 3, 2020 general election (the "Audit"). *See* APPV1-0015–0016, ¶¶ 24–26. Given the logistics entailed in such an undertaking, the Arizona Senate has retained the services of Cyber Ninjas, a for-profit Florida corporation, to serve as its primary vendor in carrying out the Audit. Cyber Ninjas in turn has engaged several subvendors, all of which are private companies. *See* APPV1-0016, ¶ 28.

Real Party in Interest American Oversight submitted to each of President Fann, Chairman Petersen, the Arizona Senate, Senate Audit Liaison and former Secretary of State Ken Bennett, Cyber Ninjas, and Cyber Ninjas' subvendors several public records requests seeking essentially all documents relating to or concerning the Audit. *See* APPV1-0020, 0021, ¶¶ 56, 58-59, 61. The Senate has produced, or will produce, to American Oversight

any documents in the physical possession or physical custody of any of the Senate or of Secretary Bennett[1] that are (1) responsive to American Oversight's public records requests; and (2) not protected from disclosure by any constitutional, statutory or common law privilege or confidentiality. Indeed, the Senate has already disclosed the sources of Cyber Ninjas's funding; the policies governing the Audit; and the relevant government contracts, indemnifications, and leases. Moreover, the media and the Arizona Secretary of State each designated observers for daily, in-person access to audit proceedings. *See* APPV2-0143; Arizona State Senate, Audit Public Reading Room, *available at* *http://statecraftlaw.box.com/v/senateauditpublicreadingroom*.[2]

The Senate has consistently taken the position, however, that it cannot and will not obtain, review or produce any records that are in the physical possession or physical custody of Cyber Ninjas and/or one of its subvendors, but not in the physical possession or physical custody of any of the Defendants or of Secretary Bennett (hereafter, the "Disputed Records").

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[1] The Senate believes that Secretary Bennett is not an "officer" within the meaning of A.R.S. § 39-121.01(A)(1). Nevertheless, in the interest of narrowing the scope of the parties' dispute, the Senate has produced responsive public records possessed by Secretary Bennett, subject to the withholding or redaction of privileged or confidential material.

[2] *See generally Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 601 (App. 2016) ("[P]ublic records regarding matters referenced in a complaint, are not considered matters outside the pleading." (internal quotation marks omitted)).

II. Procedural History

American Oversight initiated this action on May 20, 2021 by filing in the Superior Court a Verified Complaint and an Application for an Order to Show Cause, which asked the Court to "set a return hearing at its earliest convenience." APPV1-0282. The Superior Court granted the Application on May 21 and set a return hearing for May 27. APPV1-0283. The Senate thereafter filed a Motion to Dismiss American Oversight's claims pursuant to Arizona Rule of Civil Procedure 12(b)(6). Following briefing and oral argument, *see* APPV2-003–0057, the Superior Court denied the Motion to Dismiss in a minute entry issued on July 15, 2021. The court reasoned that the case was justiciable and that the Senate has "constructive possession" of the Disputed Records. *See* APPV2-0064.[3] Integral to the Superior Court's conclusion was the indemnification clause in the Master

[3] It bears noting that a court adjudicating a Rule 12(b)(6) motion may only "***assume*** all the facts alleged in the complaint are true." *Republic Nat. Bank of New York v. Pima County*, 200 Ariz. 199, 201, ¶ 2 (App. 2001) [emphasis added]. Rule 12(b)(6) is not a vehicle for factual ***adjudications***. Indeed, the Senate had not (and was not required to have) even answered American Oversight's complaint before moving to dismiss. The Superior Court, however, repeatedly elided this critical distinction in its July 15 minute entry—casting various allegations as definitively proven facts, rather than merely crediting the Complaint's assertions solely for purposes of deciding a threshold motion. The Superior Court's August 2 minute entry—which issued just a few days after American Oversight filed an Amended Complaint—declared preemptively that "further discovery, pleading practice or development of the record" would not "change the findings already made by this Court," APPV1-0007. While this procedural impropriety ultimately is not especially material to the questions presented in this Petition, it does derogate the Senate's right to controvert underlying facts as necessary, and to hold American Oversight to its burden of proof.

Services Agreement ("MSA") between the Senate and Cyber Ninjas, which affords the former the option of requesting that Cyber Ninjas supply documents "reasonably necessary to the defense or settlement" of claims alleging that "any action undertaken by [Cyber Ninjas] in connection with [Cyber Ninjas'] performance under this Agreement violates law or the rights of a third party under any theory of law." APPV1-0155, 0156 (§§ 15.3, 15.4).

On July 19, 2021, American Oversight submitted a proposed order requiring the Senate to exercise its putative rights under the indemnification clause—notwithstanding that American Oversight has never asserted ***any*** claims against Cyber Ninjas—to obtain and produce the Disputed Records. The Senate objected that the immunity conferred by Article IV, Part 2, Section 7 of the Arizona Constitution precluded the court from commandeering the Senate and its officers in connection with the release or withholding of legislative records. The Superior Court entered the order sought by American Oversight on August 2, 2021, *see* APPV1-0002 and explained its reasoning in an accompanying minute entry, *see* APPV1-0004.

After staying the Superior Court's order, the Court of Appeals accepted special action jurisdiction but denied relief in an order issued on August 19, 2021. A copy of the Court of Appeals' memorandum decision is attached hereto.

Whether and to what extent the Disputed Records are subject to the PRA—and whether and to what extent the Court can, consistent with the legislative immunity enshrined in the Arizona Constitution, compel the leadership of a coequal branch to harvest

and produce a private corporation's documents—accordingly are the questions now before this Court.

STATEMENT OF THE ISSUES

1. Does Article IV, Part 2, Section 7 of the Arizona Constitution immunize the Senate and its members from suit in connection with decisions to produce or withhold alleged legislative records pursuant to the PRA?
2. Does the PRA require public bodies to collect and produce pursuant to the PRA the internal corporate records of their independent contractors when such materials are not in the physical "custody" of the public body?

JURISDICTION

In determining whether to exercise its discretionary prerogative to accept review of a denial of special action relief, this Court weighs several factors, including (1) whether an Arizona decision controls the point of law in question, (2) whether a decision of this Court should be overruled or qualified, (3) whether there are conflicting decisions by the Court of Appeals, and (4) whether important issues of law have been incorrectly decided. *See* Ariz. R. P. Special Action 8(b), A.R.C.A.P. 23(d)(3). All four considerations warrant the acceptance of review in this case.

First, no Arizona court has previously addressed whether the PRA extends to the internal records of private companies that provide goods or services to the government as independent contractors. As discussed *infra*, despite the lower courts' effort to engineer

what is effectively a bespoke exception to the PRA for this particular (politically controversial) vendor, their holding finds no textually sound or logically coherent limiting principle. Either the PRA mandates public bodies to commandeer and produce those internal files of its vendors that qualify as "public records"—or it does not. There is simply no textual basis in the PRA for conditioning its construction of the type of government contractor at issue or the putative "importance" of its function. In any event, the Court should grant review and resolve this consequential question, which inevitably will recur when a raft of PRA plaintiffs inundate state and local agencies with demands for their contractors' files. *See generally Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140, ¶ 5 (2005) (granting review to consider "a matter of first impression for this court"); *Hogan v. Wash. Mut. Bank*, 230 Ariz. 584, 585, ¶ 4 (2012) (granting review "because the cases present a recurring issue of first impression and statewide importance").

Second, the Senate believes that this Court's conception of legislative immunity is, and has always been, clear. The Speech or Debate Clause of the Arizona Constitution, *see* art. IV, pt. 2, § 7, is coterminous with its federal counterpart. It imparts "[a]bsolute" immunity against all claims arising out of the performance of a "legislative function," *Mesnard*, 489 P.3d at 1193, ¶¶ 12, 13, and thus "is equally applicable to . . . actions seeking declaratory or injunctive relief." *Consumers Union of the U.S.*, 446 U.S. 719, 725-26, 733 (1980). A single paragraph in this Court's opinion in *State ex rel. Brnovich v. Arizona*

Board of Regents, 250 Ariz. 127, ¶ 28 (2020), however, prompted the Court of Appeals to erroneously confine legislative immunity to only personal claims for monetary damages—a remarkable constriction of the immunity never countenanced by this Court. Animating this misapprehension was a failure to distinguish between the ***constitutional*** immunity conferred ***only*** on the Legislature by the Speech or Debate Clause from the conditional and qualified ***common law*** legislative immunity that the Board of Regents purported to assert in *Brnovich*. The Court should grant review to dispel this confusion and the serious error of law that it precipitated.

Third, the Court of Appeals' new discovery in the PRA of a notion of "constructive" custody deviates from that tribunal's prior pronouncements, which recognized that a public body's ostensible "right" or ability to obtain a third party's documents does not engender legal "custody." *See Stuart v. City of Scottsdale*, 1 CA-CV 18-0154, 2020 WL 7230239, at *9 (App. Dec. 8, 2020);[4] *see also Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 540, ¶ 22 (App. 2008) (defining scope of PRA obligations by reference to possession).

Fourth, the issues presented in this Petition—*i.e.*, the vindication of constitutional legislative immunity and delineating the proper scope of the PRA, as embodied in its plain

[4] A copy of the memorandum decision in *Stuart*, which the Senate cites as a persuasive authority pursuant to Ariz. Sup. Ct. R. 111(c)(1)(C), is included in the record at APPV2-0148.

text—unquestionably are issues of statewide importance. *See Mesnard*, 489 P.3d at 1193, ¶ 10 (granting review "to address the scope of absolute legislative immunity under Arizona law, an issue of statewide importance"); *Lake v. City of Phoenix*, 222 Ariz. 547, 549, ¶ 6 (2009) (granting review to "address a recurring issue of statewide importance" under the PRA).

STANDARD OF REVIEW

The applicability of legislative immunity and the construction of the PRA both are pure questions of law that this Court reviews *de novo*. *See Mesnard*, 489 P.3d at 1192, ¶ 12 ("Whether legislative immunity applies is a legal question for the court."); *Lake*, 222 Ariz. at 549, ¶ 7 (whether a document is subject to the PRA is a legal question).

ARGUMENT

I. The Senate Is Constitutionally Immune From Suit Because the Decision Whether to Release or Withhold Audit Records Is a Legitimate Legislative Function

The Petitioners are constitutionally immune from any civil liability in ***any*** form (whether monetary, injunctive or special action in nature) arising out of the release or withholding of Audit-related documents.

A. Legislative Immunity Encompasses Non-Monetary Claims

When legislators "are acting within their 'legitimate legislative sphere,' the Speech or Debate Clause [in Article IV, Part 2, Section 7 of the Arizona Constitution] serves as an absolute bar to . . . civil liability." *Arizona Indep. Redistricting Comm'n v. Fields*, 206

Ariz. 130, 136, ¶¶ 15–16 (App. 2003). "When applicable, the doctrine prevents legislators, their aides, and their contractors from being criminally prosecuted or held civilly liable for their legislative activities." *Mesnard*, 489 P.3d at 1193, ¶ 12; *see also Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) ("Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'").

The Court of Appeals' reasoning that legislative immunity protects individual legislators only from damages in connection with claims against them personally, *see* COA Op. ¶ 15, deeply misapprehends the doctrine's provenance, scope and purpose—not to mention a long lineage of case law.

The United States Supreme Court and virtually every Circuit court to have addressed the question have spoken uniformly: state legislators' immunity from damages claims "is equally applicable to" claims seeking declaratory or prospective relief. *Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 725-26, 733 (1980); *see also Star Distributors, Ltd. v. Marino*, 613 F.2d 4, 9 (2d Cir. 1980) (holding in the context of a legislative investigation that state legislators are immune from "for injunctive relief as well as damages based on their activities within the traditional sphere of legislative activity"); *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 252 (3d Cir. 1998) (acknowledging that "in fact the Supreme Court in *Consumers Union* did resolve the issue of the application of absolute legislative immunity to claims for prospective relief and answered that question in the affirmative"); *Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1102 (6th Cir. 1990)

("The [legislative] immunity granted is immunity from suit and applies whether the relief sought is money damages or injunctive relief."); *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991) ("Legislators' immunity is absolute and extends to injunctive as well as to damages suits." (internal citation omitted)); *Church v. Missouri*, 913 F.3d 736, 753 (8th Cir. 2019) (dismissing on legislative immunity grounds suit seeking prospective relief); *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 959 (9th Cir. 2010) ("This [legislative] immunity extends both to claims for damages and claims for injunctive relief."); *Scott v. Taylor*, 405 F.3d 1251, 1255 (11th Cir. 2005) ("[W]e hold that the legislator defendants in the instant official capacity suit for prospective relief are entitled to absolute immunity."); *Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 520 (Fla. Dist. Ct. App. 2012) (quashing on legislative privilege grounds subpoena to legislator seeking testimony); *League of Women Voters of Pa. v. Commonwealth*, 177 A.3d 1000, 1006 (Pa. Commw. Ct. 2017) (quashing subpoenas to legislators, explaining that "the Court lacks the authority under the Speech and Debate Clause of the Pennsylvania Constitution to compel the production of the documents sought").

Arizona courts have never signaled any intention to repudiate this established conception of legislative immunity. To the contrary, the Court of Appeals first articulated Arizona's cognate immunity in terms that drew directly from the federal case law. *See Fields*, 206 Ariz. at 136-37, ¶¶ 15-17. And—notably—this Court approvingly cited these

same formulations in both *Brnovich* and *Mesnard*. *See Brnovich*, 476 P.3d at 314, ¶ 28; *Mesnard*, 489 P.3d at 1193, ¶ 12.

In this vein, the single paragraph in *Brnovich* upon which the Court of Appeals relied is best understood as implicitly reflecting the distinction between constitutional and common law immunities. The Board of Regents undisputedly is not a component of the Arizona State Legislature, and thus is facially outside the scope of the Speech or Debate immunity enshrined in Article IV, Part 2, Section 7.[5] The upshot is that any legislative immunity presumptively shielding the Board of Regents would be a product of common law or statute,[6] and thus subject to abrogation by the Legislature, as the Court found. *See generally Williams v. DeKalb County*, 840 S.E.2d 423, 435 (Ga. 2020) ("While some immunities for members of the General Assembly are provided in our constitution, legislative immunity for local officials arises from statutes or from common law. An immunity conferred by statute or common law may be abrogated by statute."); *see also Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (commenting that the immunity of *state* legislators in *federal* court derives from common law but had not been abrogated by statute). The legislative immunity that envelopes the actual legislative branch, by contrast,

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[5] By contrast, Article XI, Section 5, which established the Board of Regents, does not codify any express immunity.

[6] *See* A.R.S. § 15-1621(F) (providing qualified immunity for members of the Board of Regents).

is of constitutional provenance and its protections accordingly are plenary and permanent. *See Mesnard*, 489 P.3d at 1193, ¶ 12.

B. Decisions to Release or Withhold Legislative Records Are Inherently Legislative Functions

American Oversight's argument that the release of legislative records is not an immune legislative function finds express repudiation in *Mesnard*, which held precisely the opposite: "Mesnard's act in releasing the report to the public was . . . a legislative function protected by legislative immunity." 489 P.3d at 1195, ¶ 22. This point is critical. American Oversight attempts to sever the Audit itself—which it appears to concede is a legislative function—from the consequent release or impoundment of related records, which it dismisses as "administrative." But this inventive parsing is irreconcilable with *Mesnard*. There, former Representative Shooter was challenging not only the legislative investigation into his alleged misconduct; rather, his claims pivoted largely on then-Speaker Mesnard's subsequent release of documents and information concerning the investigation, which the Supreme Court concluded was itself a "legislative function." *Id.* at 1196, ¶ 23.

This finding did not entail doctrinal innovations; the Court drew on a lineage of federal cases likewise concluding that official acts relating to the publication of legislative records are insulated from judicial review. *See, e.g.*, *Doe v. McMillan*, 412 U.S. 306, 313 (1973) ("The acts of . . . authorizing the publication and distribution of that [legislative]

report were all 'integral part(s)'" of the legislative process); *Hutchinson v. Proxmire*, 443 U.S. 111, 124 (1979) (reaffirming that the release of committee reports is a protected activity, explaining that "the Court has given the [Speech or Debate] Clause a practical rather than a strictly literal reading which would limit the protection to utterances made within the four walls of either Chamber").

American Oversight's insistence that the PRA mandates the "nondiscretionary" release of the Disputed Records in this case impermissibly bootstraps its theory of a statutory violation into the antecedent question of constitutional immunity. The latter is determined by the intrinsic character of the act or omission at issue; a statute cannot transmute a legislative act into an administrative task, or *vice versa*. *See Fann v. State of Arizona*, No. CV-21-0058-T/AP, slip op. at 10, ¶ 24 (Ariz. Aug. 19, 2021) ("[A] statute cannot circumvent or modify constitutional requirements."). Indeed, it was for precisely this reason that the Court added that Mesnard's ability to invoke legislative immunity was not contingent upon whether his production of the legislative reports was or was not premised on an actual public records request made pursuant to the PRA. *See Mesnard*, 489 P.3d at 1196, ¶ 23.

Because decisions to *release* putative legislative records are ensconced by legislative immunity, it follows necessarily that determinations to *withhold* such materials likewise are protected; to condition legislative immunity on a finding that the legislative act or omission at issue was statutorily compliant would reduce the principle to a futile tautology.

See id. at 1196, ¶ 25 ("Whether Mesnard violated House rules, statutory law, or even the state or federal Constitution has no bearing on whether his actions were legislative functions and thus afforded immunity.").

C. The Individual Legislators' Immunity Extends to the Senate Itself

The same immunity that insulates President Fann and Chairman Petersen from liability under the PRL likewise envelopes the "Arizona Senate" as a named defendant. Two reasons impel this conclusion.

First, the remedies American Oversight seeks can be effectuated only through the actions and decisions of individual Senate officers. In this context, at least, the entity has no functional existence independent of its constituent members. For example, any request to Cyber Ninjas for its corporate records can be implemented only through direct action by President Fann in her official capacity. As a practical matter, any adjudication in favor of American Oversight inevitably will entail a judicial directive to President Fann, Chairman Petersen or some other officer or member of the Senate, all of whom individually are immune from such compulsory process. This functional (if not strictly legal) congruence of identity underscores that "[t]he concerns that led to adoption of the Speech or Debate Clause deal not only with the independence of individuals legislators; those same concerns ordained an independent legislature, a [legislature] not subject to general oversight by either the executive or judicial branches of government." *Gregg v. Barrett*, 771 F.2d 539, 543 (D.C. Cir. 1985) (dismissing on equitable discretion grounds claims arising out of

preparation of the *Congressional Record*); *see also State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 633 (Kan. 1984) ("The petitioner also argues this case does not fall under the broad umbrella of immunity conferred by the Speech or Debate Clause because it is the action of the legislature as a body which is being challenged rather than the actions of individual members of the legislature. This distinction is not a valid one."); *Romer v. Colorado Gen. Assembly*, 810 P.2d 215, 225 (Colo. 1991) ("When the General Assembly is engaged in legitimate legislative activity, the speech or debate clause protects individual legislators and the legislature as a whole from being named defendants in an action challenging the constitutionality of legislation.").

Second, the separation of powers concerns from which legislative immunity derives become even more acute when the judiciary purports to direct an entire legislative institution in the management of its own documents and records. *See generally London v. Broderick*, 206 Ariz. 490, 492-93 (2003) (access to court records is determined by the judiciary's own rules, not the PRA). To be sure, courts of course may assess the ultimate enactments of the Legislature for compliance with the Arizona Constitution. But since the early days of statehood, the Supreme Court has long cautioned that—absent some claim of ***constitutional*** wrongdoing—the internal workings of this separate and coequal branch lie beyond the judicial grasp. *See City of Phoenix v. Superior Court of Maricopa County*, 65 Ariz. 139, 144 (1946) ("Courts have no power to enjoin legislative functions."); *State v. Osborn*, 16 Ariz. 247, 249 (1914) ("[C]ourts cannot interfere with the action of the

legislative department."); *Allen v. State*, 14 Ariz. 458, 479 (1913) ("Until the people, through their fundamental law, shall require the courts to supervise and direct the actions of the other departments in the process of making laws, we shall adhere to the theory of government that those departments are responsible to the people . . . and not to the courts."). The notion of a court order coercing the president of a legislative house to divulge putative legislative records would subvert the interbranch balance that underpins constitutional government.

D. Legislative Immunity Has Not Been Abrogated

Contrary to the Court of Appeals' intimations, *see* COA Op. at ¶ 15, the PRA did not abrogate the Senate's constitutionally ordained immunity, and even if it did, the relief American Oversight seeks can be effectuated only through the actions of individual legislative members and officers, who retain their own independent immunity. Preliminarily, the mere fact that one iteration of the Legislature decades ago professed to commit the institution to abiding by the PRA does not operate as a plenary submission to the enforcement jurisdiction of the courts. Any concession of legislative immunity must be "explicit and unequivocal." *United States v. Helstoski*, 442 U.S. 477, 490-91 (1979). That the Legislature volunteered itself to follow the PRA—and does, in fact, adhere to the statute—is not tantamount to a renunciation of its immunity from suit.

Further, even if the PRA somehow extinguished the Senate's legislative immunity (and it did not), the body's individual officers and members—the persons to whom the

Court would have to direct any order and who would carry out such commands—retain the protection. Legislative immunities and privileges are personal to each individual legislator occupying his or her office at any given moment in time; they cannot be preemptively waived decades in advance by one incarnation of the institution. *See generally* Wright & Miller 26A FED. PRAC. & PROC. EVID. § 5675 (1st ed.) ("The speech or debate privilege belongs to the legislator whose legislative act is involved in the evidence."); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992) ("The privilege is a personal one and may be waived or asserted by each individual legislator."). President Fann and Chairman Petersen have never waived their immunity from suit under the PRA.

In short, the protections of the Speech or Debate Clause encompass all actions undertaken by legislators in the course of their official duties—to include the release or withholding of legislative records; in this realm, "the prohibitions of the Speech or Debate Clause are absolute." *Eastland*, 421 U.S. at 501 (adding that the protection extends to claims for injunctive relief).

II. The PRA Does Not Recognize Any Concept of "Constructive" Custody, and Even If It Did, "Constructive" Custody is Lacking in this Case

The Court can and should find that the Senate is immune from American Oversight's suit in its entirety. Even if it should decline to do so, however, American Oversight's

claims with respect to the Disputed Records remain deficient because the Senate necessarily lacks "custody" of third parties' internal corporate files.

A. The Court of Appeals' Notion of "Constructive" Custody is Not Cognizable Under the PRA

The PRA does not secure some disembodied "right" by any person to obtain any document that may be a "public record"—regardless of where on Earth it may be found. Rather, the statute provides that an individual may obtain a public record from (1) a "public body" or "officer" that (2) has "custody" of it. *See* A.R.S. §§ 39-121, -121.01. The Senate does not have "custody" of documents maintained by corporate vendors at their own headquarters or in their own internal computer systems.

To square the proverbial circle, the Superior Court and Court of Appeals devised a concept they denominated "constructive" possession and, apparently relying solely on the Complaint's allegations, imputed to the Senate such possession of Cyber Ninjas' records. But the lower courts' doctrinal invention—to wit, that the internal files of a private corporation must be open to public inspection if they relate to services performed for a governmental entity—embodies a new policy diktat that is untethered from the statutory text.

1. The "Constructive" Custody Concept is Not Supported by the PRA's Text

At bottom, the Court of Appeals' opinion can be sustained only interpolating into the PRA words absent from its actual text. While imperatives of transparency certainly

undergird the PRA, courts do not invoke amorphous aspirations to "go beyond the statute to contradict its clear import," *Prescott Newspapers v. Yavapai Cmty. Hosp. Ass'n*, 163 Ariz. 33, 40 (App. 1989), or to distend statutory language beyond its plain meaning "simply because that's what must have been intended," *id.* at 38 (internal citation omitted); *see also State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 298, ¶ 28 (App. 2006) ("We do not disregard plain statutory language in favor of arguments about which of two competing legitimate public policies is preferable.").

The PRA "applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained." *Cf. Forsham v. Harris*, 445 U.S. 169, 186 (1980) (discussing the federal Freedom of Information Act). As the Tenth Circuit explained when rejecting the notion that a federal agency's contractual right to procure certain documents from a third party organization rendered those materials subject to FOIA, "it does not matter that the [agency] could possess the documents by requesting them from [the counterparty]." *Rocky Mountain Wild v. U.S. Forest Serv.*, 878 F.3d 1258, 1263 (10th Cir. 2018). Rather, legal "control" of records attaches when "the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* (internal citation omitted); *see also State of Missouri, ex rel. Garstang v. U.S. Dept. of Interior*, 297 F.3d 745, 751 (8th Cir. 2002) ("Although the [non-profit corporation] and the [federal agency] did have a mutually beneficial relationship, that relationship alone does not transform the private entity . . . into a federal agency.").

Brushing aside the corpus of federal cases in favor of a thirty year old case out of North Dakota, *see* COA Op. at ¶ 23, the Court of Appeals also invoked the decisions of California courts, which it emphasized are especially salient, *see id.* at n.2. Tellingly, however, the California Court of Appeal—while accepting in principle the concept of "constructive" possession—expressly found that it is **not** engendered by a government agency's unconsummated right or ability to obtain its contractors' records. In words that should resonate (but so far have been ignored) in this case, the court explained that:

> The mere fact that [the agency] can 'access' the data does not equate to a form of possession or control. To conclude otherwise would effectively transform any privately-held information that a state or local agency has contracted to access into a disclosable public record. Nothing in the text or history of the [California Public Records Act] suggests it was intended to apply so broadly.

Anderson-Barker v. Superior Court, 242 Cal. Rptr. 3d 724, 732–33 (Ct. App. 2019).

In its search to find a textual reed upon which to hang its novel theory of "constructive" custody, the Court of Appeals also cited A.R.S. § 39-121.01(B), which states that "[a]ll officers and public bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state." But this provision prescribes, at most, a minimum baseline of adequate recordkeeping. *See Carlson v. Pima County*, 141 Ariz. 487, 490 (1984) ("Section 39–121.01(B) creates a statutory mandate which, in effect, requires all officers to make and maintain records reasonably necessary to provide knowledge of all activities they

undertake in the furtherance of their duties."). In other words, the Senate must implement at least some rudimentary recordkeeping structure and ensure that its own documents are protected against improper destruction or alteration. *See generally Hutto v. Francisco*, 210 Ariz. 88, 91 n.5 (App. 2005) ("Maintain is defined as '[t]o continue [or to] preserve or keep in a given existing condition.'" (quoting WEBSTER'S II NEW COLLEGE DICTIONARY 660 (2001)); BLACK'S LAW DICTIONARY (11th ed. 2019) (the primary legal definition of "maintain" is "to continue (something)").

American Oversight does not allege (nor could it) that the Senate fails to keep records of its activities, including the Audit. To the contrary, the Senate currently is reviewing tens of thousands of its own internal emails that may be responsive to American Oversight's public records request. To allege that *other* third party entities might *also* have documents relating to a governmental function does not—as a matter of law or logic—establish that the Senate has violated any obligation to "maintain" its own records. To the contrary, the Attorney General has explained that the Legislature necessarily has no duty to maintain and produce text messages on the personal devices of individual legislators because those materials were never records of the Legislature to begin with. *See* Ariz. Op. Atty. Gen. No. I17-004 (July 7, 2017) (concluding that "[t]he plain text of the relevant statutes contemplates government management of *government* systems alone," adding that "an agency does not have control of private electronic devices or social media accounts"); *cf. Am. Civil Liberties Union v. Arizona Dep't of Child Safety*, 240 Ariz. 142, 148, ¶ 17

(App. 2016) (holding that "our public records law does not require an agency, in responding to a public records request, to create a new record"). Implicit in the Attorney General's conclusion was a recognition that the Legislature does not transgress Section 39-121.01(B) simply because third parties not subject to the PRA might create or maintain their own *additional* records outside the custody of the Legislature.

2. The Legislature Never Intended to Expose Government Vendors' Records to Public Inspection

As discussed above, the Court of Appeals' "constructive" custody contrivance is foreign to the PRA's text and precedential lineage. Even if some surmised, unarticulated legislative intent were a relevant interpretive lodestar, however, there is good reason to conclude that the Legislature's exclusion of private contractors from the PRA was deliberate and prudent. State, county and municipal agencies rely on hundreds if not thousands of outside vendors to furnish an array of goods and services—ranging from sensitive IT equipment, to key public infrastructure, to outside legal counsel—in virtually every facet of state government. Indeed, the state's largest county has outsourced substantial components of its election administration infrastructure to two private corporations, Dominion Voting Systems and Runbeck Election Services.

While the ostensibly "non-partisan" American Oversight is singularly fixated on Cyber Ninjas and perceived Republican interests, the import of the ruling it seeks will not be so easily contained. If the Court of Appeals' decision stands, then the internal emails,

databases and other files of Dominion and Runbeck, the undersigned law firm, American Oversight's law firm,[7] and every other vendor of any state, county or local government agency or unit in Arizona will be swept under the auspices of the PRA, and each individual document in its possession relating to its government contract will be presumptively subject to indefinite preservation and ultimately disclosure as a public record.

The Court of Appeals offers two anemic assurances that its ruling is little more than a "good for one ride only" ticket that applies to Cyber Ninjas' but not other government vendors. Neither withstands serious scrutiny.

First, the court's affirmation that the PRA applies only to records having a "substantial nexus" to the government engagement, *see* COA Op. at ¶ 24, merely begs the question. By definition, corporate files (including, *e.g.*, internal emails saved to the company's server) that pertain to services the vendor is performing at the behest of a government client necessarily have a "substantial nexus" to that government function. That criterion does nothing to constrain the reach of the PRA to non-governmental entities.[8]

Second, the Court of Appeals' attempt to chisel a bespoke exception to the PRA for Cyber Ninjas by distinguishing between "ordinary services" and "core governmental

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[7] Coppersmith Brockelman represented the Secretary of State in several matters relating directly to the conduct and administration of the 2020 election.

[8] Take the illustrative example of private companies hired by the state to build a new freeway. The "substantial nexus" rubric counsels that only internal files (*e.g.*, emails among company personnel) concerning the freeway project are subject to public records

functions," COA Op. at ¶ 24, is unconvincing and untenable. This inventive dichotomy has no textual, precedential or logical nexus to any words that actually are codified in the PRA. Indeed, how courts are supposed to distinguish "ordinary services" from other ("unordinary"?) services or disentangle "core" government services from other ("non-core"?) functions is left notably unexplained. If legislative investigations are "core" governmental functions, does the same appellation extend to counties' administration of elections? Public infrastructure projects? Contracts to administer social services to populations in need?

In short, either the PRA sweeps up the internal records of third party vendors rendering services to the government, or it does not; courts cannot contrive arbitrary designations of "ordinary" and "unordinary" government services or projects to selectively target those vendors they deem deserving of greater scrutiny. The draconian recordkeeping

requests, but does nothing—under American Oversight's and the Superior Court's theory—to prevent these corporate files from being swept under the PRA's auspices in the first place.

regime that the Court of Appeals' ruling presages may or may not be desirable as a policy matter, but it is not the framework the Legislature chose to codify in the PRA.

B. Even if "Constructive" Custody Is Recognized by the PRA, the Senate Does Not In Fact Have Constructive Custody Over Cyber Ninjas' Records

A party "cannot produce what he does not have." *United States v. Fitzpatrick*, 07-2184-PHX-RCB, 2008 WL 853055, at *7 (D. Ariz. Feb. 4, 2008). Despite American Oversight's exertions to defy it, this truism inevitably endures. Even if the notion of "constructive" custody could be unearthed from the PRA, American Oversight still must show that ***these*** Defendants have "constructive possession" of ***these*** specific Disputed Records. How, exactly, the Senate is supposed to extract the internal files of Cyber Ninjas—let alone those of Cyber Ninjas' subvendors—is a point of conspicuous silence in the Court of Appeals' opinion.

American Oversight's argument on this point pivots on the indemnification and cooperation provisions of the MSA, which afford the Senate the right to request that Cyber Ninjas to transmit relevant documents and otherwise cooperate in the common defense of litigation. *See* APPV1-0155, 0157. But the MSA's indemnification and cooperation provisions do not beget *any* legal obligations of the Senate, let alone responsibilities enforceable by third parties. To the contrary, they secure the Senate's right to protect itself from liability—not a peremptory duty to indiscriminately fetch any and all corporate records of Cyber Ninjas that may relate to the Audit for the purpose of satisfying American

Oversight's curiosity.[9] Exercising her responsibilities as the steward of the institution's interests, President Fann has determined that—unless and until a court forces her to do so—she cannot and will not invoke any discretionary prerogative under those contractual provisions because doing so would not aid or assist the Senate's defense of this suit.[10]

Even if the Senate were not constitutionally immune from such a court order (*see supra* Section I), the PRA does not authorize its issuance in any event. Any "right" to obtain public records is a creature of statute; it does not derive from any constitutional command or common law proposition.[11] Accordingly, its vindication is confined only to those means and methods dictated by the Legislature. In this vein, the PRA provides that public records may be obtained only through "a special action in the superior court,

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[9] Indeed, the indemnification clauses—which apply only to claims ***against Cyber Ninjas***, see APPV1-0155—is facially inapplicable in any event.

[10] In this vein,, American Oversight's reasoning relies in large part on circularity. For example, the cooperation clause commits Cyber Ninjas to "providing information or documents needed for the defense of [the] claims, actions or allegation." But what, exactly, are those "needed" documents? The Senate, the beneficiary of the cooperation clause, believes that Cyber Ninjas' internal files concerning the 2020 election audit are not "needed for the defense" of American Oversight's PRA claims because such materials are outside the scope of the statute. Put another way, the cooperation clause is relevant only if one presupposes that the Senate has an obligation to produce Cyber Ninjas' records pursuant to the PRA in the first place, and hence "need[s]" the documents "for the defense of [the PRA] claims." It does not independently establish "constructive custody" (whatever that is).

[11] Conversely, however, courts have drawn on the common law to fashion *limitations* on the statutory right of access. *See Carlson v. Pima County*, 141 Ariz. 487, 490 (1984).

pursuant to the rules of procedure for special actions against the officer or public body." A.R.S. § 39-121.02(A). While courts will countenance some flexibility in the precise manner of pleading, *see Moulton v. Napolitano*, 205 Ariz. 506, 516, ¶ 34 (App. 2003) (finding PRA complaint sufficient where it "was denominated in the alternative as one for special-action relief"), the PRA empowers the judiciary to supply only "special action" relief.

Importantly, a "special action" does not embrace any and every form of non-monetary relief against a public officer. To the contrary, special action remedies are constricted and delimited concepts; they do not partake of the malleability and versatility of their counterparts in equity (*e.g.*, an injunction). Simply put, the "special action" is the modern and more streamlined incarnation of the old writs of certiorari, prohibition and mandamus. *See* Spec. Action R. Proc. 1(a); *see also id.* State Bar Committee Note ("Under the special action, the relief obtainable includes any relief which was formerly granted under the labels of certiorari, mandamus, and prohibition."). Unless a governing statute provides otherwise, the relief a plaintiff seeks must conform to the contours of at least one of those three concepts. *See Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 403–04, ¶ 15 (2020) (cautioning that "'only' certain 'questions may

be raised in a special action'"). Notions of certiorari or prohibitory relief are obviously inapposite here. Thus, the only remotely germane writ would be the third: mandamus.

But this remedial theory quickly dissipates as well. "Because a mandamus action is designed to compel performance of an act the law requires, '[t]he general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus.'" *Sears v. Hull*, 192 Ariz. 65, 68, ¶ 11 (1998). A corollary is that when a legal duty that implicates discretion underlies a mandamus claim, the court "may not designate how that discretion shall be exercised." *Kahn v. Thompson*, 185 Ariz. 408, 411 (App. 1995); *see also Sensing v. Harris*, 217 Ariz. 261 (App. 2007) (statute directing that police chief "shall be responsible for the enforcement" of municipal ordinances did not embody a nondiscretionary legal duty enforceable by mandamus).

In the ordinary course, claims under the PRA are easily amenable to mandamus remedies because the documents already are in the physical possession of the public body or officer. Once the court determines that the records qualify for disclosure, it need only order the ministerial act of their production. Here, by contrast, American Oversight's entire theory of "custody" depends on the Senate exercising a discretionary right in a particular manner—*i.e.*, choosing to invoke the indemnification clause to demand Cyber Ninjas' transfer of particular records. Stated differently, the "custody" that American Oversight envisages can be actualized only by a court order compelling the Senate to perform a discretionary act contemplated by a private contract. Whatever designation should attach

to such an order, it certainly is not "mandamus." Accordingly, the lower courts' orders purporting to coerce the Senate into invoking its options under the MSA was both constitutionally and statutorily *ultra vires*.

CONCLUSION

For the foregoing reasons, the Court should grant review, vacate the opinion of the Court of Appeals, and issue special action relief finding that the Superior Court exceeded its jurisdiction in (1) abrogating legislative immunity and (2) issuing an order compelling the Senate to commandeer and harvest the internal files of third party private corporations, which are not in the "custody" of the Senate for purposes of the PRA.

RESPECTFULLY SUBMITTED this 19th day of August, 2021.

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Exhibit A

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Senate Judiciary Committee; the ARIZONA SENATE, a house of the Arizona Legislature, *Petitioners*,

v.

THE HONORABLE MICHAEL KEMP, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge*,

AMERICAN OVERSIGHT, *Real Party in Interest*.

No. 1 CA-SA 21-0141
FILED 8-19-2021

Petition for Special Action from the Superior Court in Maricopa County
No. CV2021-008265
The Honorable Michael Kemp, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

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MEMORANDUM DECISION

Acting Presiding Judge Maria Elena Cruz delivered the decision of the Court, in which Judge Michael J. Brown and Judge Jennifer B. Campbell joined.

C R U Z, Judge:

¶1 In this special action, Petitioners Karen Fann, Warren Petersen, and the Arizona Senate (collectively, the "Senate") seek a writ of prohibition or other special action relief to prevent the Senate from being compelled by the superior court to disclose documents related to its audit of the November 2020 general election. For the following reasons, we accept jurisdiction and deny relief.

FACTUAL AND PROCEDURAL HISTORY

¶2 The Arizona Senate initiated an audit of voting equipment used and ballots cast in Maricopa County relating to the 2020 general election, and it retained a private corporation, Cyber Ninjas, to serve as its primary vendor in conducting the audit. Cyber Ninjas then hired multiple sub-vendors to assist in the work, also private companies.

¶3 In April and May 2021, Real Party in Interest American Oversight submitted public record requests to the Senate for documents related to the audit. The Senate produced about 60 pages of documents but asserted it would not produce documents in the possession and custody of Cyber Ninjas or any of its sub-vendors.

¶4 American Oversight filed a complaint and order to show cause under Arizona's Public Records Law ("PRL"), Arizona Revised Statute ("A.R.S") section 39-121, *et seq.*, to compel production of the documents related to the audit, including those in the possession or custody of Cyber Ninjas and its sub-vendors. Over the following several weeks, the Senate produced about 900 more pages of records to American Oversight, and the Senate informed American Oversight that it was currently reviewing an additional 15,000 documents to disclose.

¶5 The Senate then moved to dismiss American Oversight's complaint, arguing any audit records in possession of Cyber Ninjas or its sub-vendors and agents are not subject to the PRL. The Senate also argued that its compliance with the PRL is a nonjusticiable political question. The superior court denied the motion in a July 14, 2021 minute entry.

¶6 American Oversight lodged a proposed order that memorialized the court's July 14 minute entry and directed the Senate to disclose records related to the audit, including those in possession of Cyber Ninjas and its sub-vendors. The Senate objected, arguing the order would improperly serve as a final judgment on the merits; the case required further discovery; and the Senate was legislatively immune from the suit. The superior court rejected the Senate's arguments in an August 2, 2021 minute entry. The court entered the proposed order, directing the Senate to immediately disclose the records related to the audit.

¶7 The Senate subsequently filed this special action petition, as well as a motion to stay the August 2 order, which we granted pending resolution of this petition.

SPECIAL ACTION JURISDICTION

¶8 Special action review is generally appropriate when there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a); *see generally Sw. Gas Corp. v. Irwin*, 229 Ariz. 198, 201, ¶¶ 5-7 (App. 2012). Our decision to accept special action jurisdiction is discretionary, and it is "appropriate in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again." *State v. Superior Court (Landeros)*, 203 Ariz. 46, 47, ¶ 4 (App. 2002).

¶9 Here, the issues raised in the petition are pure questions of law and are of statewide importance. Accordingly, we accept special action jurisdiction.

DISCUSSION

¶10 The PRL provides: "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." A.R.S. § 39-121. Section 39-121.01(B) requires "[a]ll officers and public bodies" to "maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state." Further, "[e]ach public body shall

be responsible for the preservation, maintenance and care of that body's public records, and each officer shall be responsible for the preservation, maintenance and care of that officer's public records," and it is "the duty of each such body to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction . . . ." A.R.S. § 39-121.01(C). Section 39-121.01(A) defines "Officer" and "Public body" as follows:

> A. In this article, unless the context otherwise requires:
>
> 1. "Officer" means any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.
>
> 2. "Public body" means this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any public subdivision of this state, or expending monies provided by this state or any political subdivision of this state.

¶11 The PRL further provides: "[a]ny person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body." A.R.S. § 39-121.02(A); *see also* A.R.S. § 39-121.02(C) ("Any person who is wrongfully denied access to public records pursuant to this article has a cause of action against the officer or public body for any damages resulting from the denial.").

I. Legislative Immunity

¶12 Petitioners first argue that they are constitutionally immune from suit because "the decision whether to release or withhold audit records is a legitimate legislative function."

¶13 Pursuant to the United States and Arizona Constitutions, absolute legislative immunity protects legislators from civil and criminal

liability for statements made during formal legislative proceedings. Ariz. Const. art. IV, pt. 2, § 7 ("No member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate."); U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [senators and representatives] shall not be questioned in any other Place."). The protection has been extended to acts beyond pure speech and debate and applies to legislative acts that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. " *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see also Mesnard v. Campagnolo*, __ Ariz. __, __, ¶ 15, 489 P.3d 1189, 1194 (2021) (citation and internal quotation marks omitted).

¶14 However, legislators are not afforded absolute immunity for all acts that are "in any way related to the legislative process," nor is legislative immunity intended to make legislators "super-citizens," immune from all responsibility. *Mesnard*, __ Ariz. at __, ¶ 14, 489 P.3d at 1194; *United States v. Brewster*, 408 U.S. 501, 516 (1972). As our supreme court has noted, the concept of legislative immunity was intended "to shield individual officials from personal liability for their legislative acts," and "[i]t has nothing to do with shielding governmental entities from challenges to claimed illegal actions." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 134, ¶ 28 (2020).

¶15 The Senate, relying on *Mesnard*, argues the legislature's decision whether to release documents under the PRL is a legislative act, protected by absolute immunity. *See Mesnard*, __ Ariz. at __, ¶ 21, 489 P.3d at 1195. But *Mesnard* concluded that a legislator's disclosure of a public record under the PRL was a legislative function that afforded him immunity from personal liability in a defamation suit. *Id.* Consistent with *Brnovich*, legislative immunity does not prevent this action against legislators in their capacity as elected officials, or the legislature, for its failure to comply with statutory obligations. *See Brnovich*, 250 Ariz. at 134, ¶ 28. The ability to appeal the denial of access to public records is expressly authorized by A.R.S. § 39-121.02, and American Oversight "is not suing officials for personal liability in their individual capacities." *Id.* The legislature itself enacted this statute, and it could have completely exempted itself from disclosure requirements, like its federal counterpart, the Freedom of Information Act. *See* 5 U.S.C. §§ 551(1)(A), 552. But instead, the legislature chose to include itself within the definition of those officers and public bodies subject to the PRL. *See* A.R.S. § 39-121.01(A)(1), (2).

¶16 This is not to say the legislature can never properly refuse to disclose records under the PRL. There are many statutory exemptions to the PRL. *See, e.g.*, A.R.S. §§ 41-1279.05, 49-1403. Additionally, though there is a presumption in favor of disclosing public records, this presumption can be rebutted by a demonstration of "confidentiality, privacy, or the best interests of the state." *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297, 300, ¶ 9 (1998) (citation and internal quotation marks omitted). If any of these interests outweigh the public's right to access the records, the legislature can refuse disclosure. *Id.* However, the legislature is not afforded a blanket exemption from compliance with the PRL, nor is it exempt from lawsuits contesting a denial of access to public records.

¶17 The purpose of the legislative immunity doctrine is to "support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions"; it does not exist to serve the personal benefit of the legislators. *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137, ¶ 17 (App. 2003) (citation and internal quotation marks omitted). And it does not exist to shield the Senate from complying with a statute it has enacted. Allowing the legislature to disregard the clear mandate of the PRL would undermine the integrity of the legislative process and discourage transparency, which contradicts the purpose of both the immunity doctrine and the PRL.

II. Custody under the PRL

¶18 The PRL "exists to allow citizens to be informed about what their government is up to." *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty.*, 191 Ariz. at 302-03, ¶ 21 (citation and internal quotation marks omitted). "Arizona law defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." *Griffis v. Pinal County*, 215 Ariz. 1, 4, ¶ 8 (2007). "Only documents with a substantial nexus to government activities qualify as public records, and the nature and purpose of a document determine whether it is a public record." *Lake v. City of Phoenix*, 222 Ariz. 547, 549, ¶ 8 (2009) (citation and internal quotation marks omitted). We review de novo a document's status as a public record, *id.* at ¶ 7, but defer to the superior court's findings of fact. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 347, ¶ 11 (App. 2001).

¶19 Public officials must "make and maintain records reasonably necessary to provide knowledge of all activities they undertake in furtherance of their duties." *Carlson v. Pima County*, 141 Ariz. 487, 490 (1984). As found by the superior court, "[t]he audit is an important public

function being conducted by the Arizona Senate pursuant to the Arizona Constitution and is an official legislative activity." There is no dispute that the audit is being conducted with public funds, and that Cyber Ninjas and its sub-vendors are agents of the Senate.[1] In this case the Senate has argued no exemption that, if properly recognized, would shield itself from the responsibility to inform the public of activities regarding the audit.

¶20 The superior court found that the Senate had "at least constructive possession" of its agents' records and ordered it to produce specific public records generated in connection with the audit, including "[a]ll documents and communications relating to the planning and execution of the audit, all policies and procedures being used by the agents of the Senate Defendants, and all records disclosing specifically who is paying for and financing this legislative activity as well as precisely how much is being paid."

¶21 The Senate argues that it does not have "custody" of documents "maintained by corporate vendors at their own headquarters or in their own internal computer systems," and that the superior court's determination that they had constructive possession of the records is inconsistent with the PRL.

¶22 We disagree. "'[C]ustody' means '[t]he care and control of a thing or person for inspection, preservation, or security.'" *W. Valley View, Inc. v. Maricopa Cnty. Sheriff's Office*, 216 Ariz. 225, 229, ¶ 16 (App. 2007) (quoting *Black's Law Dictionary* 412 (8th ed. 2004)). Nothing in the plain text of the PRL suggests that physical possession of the public records by the Senate is required. "It is the nature and purpose of the document, not the place where it is kept, which determines its status." *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538 (1991) (citation omitted). "An agency has control over the documents when they have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 541-42 (citation and internal quotation marks omitted). "Possession in this context has been interpreted to mean both actual and constructive possession. [A]n agency has constructive possession of records if it has the

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[1] The Senate admitted in its answer that Cyber Ninjas is the Senate's "authorized agent." American Oversight does not argue that Cyber Ninjas or its sub-vendors are officers or public bodies, *de facto* officers or public bodies, or quasi-agencies. *See State ex rel. Am. Ctr. for Econ. Equal. v. Jackson*, 53 N.E.3d 788, 793, ¶ 15 (Ohio Ct. App. 2015).

right to control the records, either directly or through another person."[2] *Bd. of Pilot Comm'rs v. Superior Court*, 160 Cal.Rptr.3d 285, 302 (Cal. Ct. App. 2013) (citation and internal quotation marks omitted).

¶23 Here, the Senate defendants, as officers and a public body under the PRL, have a duty to maintain and produce public records related to their official duties. This includes the public records created in connection with the audit of a separate governmental agency, authorized by the legislative branch of state government and performed by the Senate's agents. *See* A.R.S. § 39-121.01(B). The requested records are no less public records simply because they are in the possession of a third party, Cyber Ninjas. As the North Dakota Supreme Court aptly observed:

> The City contends that even if these documents are subject to the open-record law, PDI is an independent contractor and not an agent of the City, and the documents were in the possession of PDI. However, whether PDI is an independent contractor or agent is not relevant . . . . PDI was hired by the City to screen and evaluate candidates for a public office. If the City had undertaken this task without hiring PDI, the applications would clearly have been subject to the open-record law. We do not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in possession of PDI. . . . [The] purpose of the open-record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records. We conclude that the documents in this case are public records . . . .

Forum Pub. Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) (citations omitted).

¶24 The Senate argues that the superior court's order would open the files of all government vendors to public inspection. In this case, the Senate outsourced its important legislative function to Cyber Ninjas and its

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[2] "The Arizona statute, adopted in 1901, was taken from a California provision. Consequently, cases arising under the California statute are helpful to the interpretation of our law." *Salt River*, 168 Ariz. at 537 (citation omitted).

sub-vendors. However, as noted *supra* paragraph 18, only documents with a substantial nexus to government activities qualify as public records. There is no reason why vendors providing ordinary services rather than performing core governmental functions would be subject to the PRL.

¶25 We find no error with the superior court's determination that the requested documents are public records that must be disclosed.

CONCLUSION

¶26 For the foregoing reasons we accept jurisdiction, deny relief, and lift the stay of proceedings previously issued regarding the superior court's August 2 order.

AMY M. WOOD • Clerk of the Court
FILED: JT